CRIMINAL YEAR SEMINAR

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CRIMINAL RULES UPDATE

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2019 Criminal Year in Review
Criminal Procedure Update
Presented by APAAC and CLE West
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State v. Weaver, 244 Ariz. 101 (App. 2018)

This is an important case, at least if you don't want to try a case twice for no good reason.

I. Rule at issue

- Rule 6.1(a): "A defendant has the right to be represented by counsel in any criminal proceeding. . . ."
- Rule 6.1(b)(1): "An indigent defendant is entitled to a court-appointed attorney . . . ."
- Rule 6.1(c): "A defendant may waive the right to counsel if the waiver is in writing and if the court finds that the defendant's waiver is knowing, intelligent, and voluntary. . . ."

II. Facts and procedural history

The arrest

- police officers responded to a report of a disturbance
- an officer approached Weaver, who was holding a crude marijuana pipe made from an aluminum can
- Weaver dropped the can as asked but then took a boxer's stance, jabbed at the air, asked the officer if he "wanted to go for it"
- other officers approached, Weaver turned toward one in the same stance
- an officer warned Weaver to calm down or he'd be tased
- regrettably, Weaver didn't listen; so he got tased
- arrested for POM, possession of drug paraphernalia, resisting arrest

The trial

- fast forward to the day of trial—before the jury was called up, Weaver asked to represent himself
- the trial court asked if he was prepared to begin trial, Weaver said no and moved to continue

- the court took a recess to review reports related to Weaver's competency; ultimately, the court denied the request, finding that it was untimely and would delay and disrupt trial
- Weaver asked if he would be able to participate in his case; the court said that he could testify if he wanted to
- after another recess, but before any jurors entered, Weaver told the court that he still wanted to represent himself and said this time that he was ready to proceed
- the court denied the "motion to reconsider"
- after lunch, the prosecutor notified the court that the denial might be an "appellate issue" (this was the prosecutor's attempt to prevent error, to no avail)
- the court reiterated that Weaver's request was untimely—raised "literally five minutes before we brought the jury up"
- the court also found that the request "would disrupt or delay the proceedings" because it believed Weaver was not prepared to proceed
- Weaver was found guilty after a jury trial

III. Legal analysis

Legal authority

The Sixth Amendment, Ariz. Const. art. 2, § 24, and ARCrP 6.1 guarantee a defendant the right to counsel.

They also guarantee a defendant the right to self-representation:

> The right to self-representation is "necessarily implied by the structure of the [Sixth] Amendment," such that the state may not "constitutionally hale a person into its criminal courts and there force a lawyer upon him . . . when he insists that he wants to conduct his own defense."

State v. Weaver, 244 Ariz. 101, 104, ¶ 8 (App. 2018) (quoting in part *Faretta v. California*, 422 U.S. 806, 807 (1975)).

Rule 6.1(c): "A defendant may waive the right to counsel . . . ."

Timeliness

The request to self-represent must be timely: before "meaningful" trial proceedings begin, which the court of appeals determined meant before the jury is empaneled. *Weaver*, 244 Ariz. at 104, ¶ 9. The court rejected a rule that would have barred requests to self-represent made on the first day of trial. *Id.*, 244 Ariz. at 104–05, ¶ 10.

Though Weaver made his request "at the last possible [allowable] moment"—just before the venire panel was brought in, his request was timely. *Id.*

Cannot delay or disrupt

The request to self-represent must not be intended to delay the proceedings, or it can be denied. *Id.*, 244 Ariz. at 105, ¶ 11. But this does not include any "delay" caused at trial due to the defendant's inexperience. *Id.*, 244 Ariz. at 105, ¶ 13. The trial court need not ascertain whether the defendant is skilled to mount a capable defense; the defendant need only be competent to waive constitutional rights. *Id.*, 244 Ariz. at 105, ¶ 12.

Although Weaver initially said that he was not ready to proceed without counsel, he later expressed an intent to proceed and represent himself. "Weaver valued his right to self-representation over any desire to postpone the trial." *Id.*, 244 Ariz. at 105, ¶ 12. The record lacked evidence from which the court could conclude that Weaver had invoked his right to self-represent to delay the trial. *Id.*, 244 Ariz. at 106, ¶ 13.

The request to self-represent must also not disrupt the trial. *See id.*, 244 Ariz. at 106, ¶ 14.

Weaver initially wanted to present a frivolous religious defense. The trial court told him, however, that no such defense would be allowed, and the record did not show that Weaver would not abide by the court's ruling. The court did not specify another basis to support its belief that Weaver would disrupt trial through self-representation. The court of appeals found the trial court's justifications inadequate: "We therefore understand the court's concerns about disruption as those typically arising in the context of any *pro se* litigant untrained in the law and courtroom procedure. Accordingly, we cannot say this concern justified denying Weaver's motion to represent himself." *Id.*, 244 Ariz. at 106, ¶ 15.

Structural error

The unfounded denial of the right to self-represent constitutes structural error. Reversal is automatic, even without a showing of prejudice. *Id.*, 244 Ariz. at 106, ¶ 16.

***State v. Bush*, 244 Ariz. 575 (2018)**

There's a lot to unpack in *State v. Bush* (some of which will be discussed by another presenter). This case involves the prosecution in Pima County of a self-proclaimed border minuteman. Bush, another man, and a woman took part in the murder of a father and daughter, and the serious wounding of a mother. This summary is limited to two significant procedural issues in the case.

I. Rules at issue

Rule 10.3 Changing the Place of Trial

> (a) Grounds. A party is entitled to change the place of trial to another county if the party shows that the party cannot have a fair and impartial trial in that place for any reason other than the trial judge's interest or prejudice.
>
> (b) Prejudicial Pretrial Publicity. If the grounds to change the place of trial are based on pretrial publicity, the moving party must prove that the dissemination of the prejudicial material probably will result in the party being deprived of a fair trial.

ARCrP 18.5(d) Voir Dire Examination

> . . . . The court must conduct a thorough oral examination of the prospective jurors and control the voir dire examination. Upon request, the court must allow the parties a reasonable time, with other reasonable limitations, to conduct a further oral examination of the prospective jurors. However, the court may limit or terminate the parties' voir dire on grounds of abuse. . . .

II. Facts and procedural history

Because of the despicable acts committed in this case, it garnered some notoriety in the media.

Bush filed a motion to change venue or to continue the case due to the "overwhelmingly" prejudicial and inflammatory statements made about him in internet stories.

The court denied the motion, finding that Bush hadn't shown that he was entitled to a presumption of prejudice in the jury pool due to pervasive and unfair media coverage.

In addition, Bush hadn't shown actual prejudice in the jury pool at the time of his motion because the jury hadn't been selected yet.

After jury selection, Bush moved for mistrial, though he didn't renew his motion to change venue. That motion was also denied.

II. Legal analysis

Change of venue

Courts will rarely presume prejudice due to pretrial publicity. *State v. Bush*, 244 Ariz. 575, 581, ¶ 12 (2018), *cert. denied*, 18-7235, 2019 WL 1590369 (Apr. 15, 2019). To meet this difficult burden, a defendant must show that "the publicity [is] 'so unfair, so prejudicial, and so pervasive that [the trial court] cannot give any credibility to the jurors' answers during voir dire" that they could remain impartial despite the pretrial publicity. *Id.* The media coverage has to be "so extensive or outrageous that it permeate[s] the proceedings or create[s] a 'carnival-like' atmosphere.' " *Id.* Some factors to consider when making this determination are 1) when the coverage occurred (i.e., at the time of the crime or the trial), 2) whether the coverage was sensational or mostly factual, and 3), whether the media successfully stirred up hysteria and passion in the community. *Id.*, 244 Ariz. at 582, ¶¶ 13–14.

The Supreme Court affirmed the trial court's denial of Bush's motion to change venue. *Id.* Most of the publicity surrounding this case took place immediately after the crimes and well before trial. Plus, most of the coverage was factual rather than sensational. Prejudice will not be assumed alone from the publication of the defendant's confession, stemming from an interview he agreed to, or from the publication of inculpatory facts disclosed through a co-defendant's trial. *Id.*, 244 Ariz. at 582, ¶14.

Alternatively, a defendant can attempt to satisfy ARCrP 10.3(b) by showing that potential jurors are not impartial (i.e., showing actual prejudice). *Id.*, 244 Ariz. at 582, ¶ 15. The defendant's burden is to show that pretrial publicity "probably will result in the party being deprived of a fair trial." ARCrP 10.3(b).

Bush attempted to meet this burden by complaining about "inconsistent" answers given by some jurors about their exposure to pretrial publicity. But all of those jurors assured the trial court during jury selection that they could set aside any opinions they had and decide the case based only on the evidence admitted during trial. Nothing in the record called the jurors' assurances into doubt. This, the Supreme Court found, prevented Bush from proving actual prejudice. *Id.*, 244 Ariz. at 582, ¶ 16.

Voir dire

During voir dire, Bush asked to show prospective jurors some graphic photographs of the murder victims and to play the 911 call from the mother, all evidence that the state intended to admit at trial. He claimed that he needed to identify those jurors whose impartiality would be "substantially impaired" during the mitigation phase by the evidence. The trial court denied his request. But the trial court did allow Bush to 1) repeatedly refer to this case as involving "first degree, premeditated, cold-blooded, inexcusable murder," and 2) "vividly" describe the "gruesome photographs" and other "gut-wrenching" evidence.

Remember voir dire's purpose: to identify unfair or partial jurors. *Id.*, 244 Ariz. at 585, ¶ 36. A party is not permitted to ask jurors how they would vote given certain facts. *Id.* Nor is a party permitted to ask jurors to commit to certain positions before evidence is admitted. *Id.* Nor is a party permitted to condition jurors to damaging evidence that will be introduced at trial. *Id.*

What the trial court allowed Bush to do enabled him to ask the panel whether the "gruesome" and "gut-wrenching" evidence would prevent them from being fair and impartial. Thus, the court did not err in barring Bush from presenting the photos and 911 recording during voir dire. *Id.*, 244 Ariz. at 585–86, ¶¶ 36–37.

***State v. Montes Flores*, 245 Ariz. 303 (App. 2018), *rev. denied* (2019)**

I. Rule at issue

ARCrP 13.5(b) (as relevant here)

- an indictment "limits the trial to the specific charge or charges stated in the . . . indictment"
- absent the defendant's consent, "a charge may be amended only to correct mistakes of fact or remedy formal or technical defects"
- a charging document is "deemed amended to conform to the evidence admitted during any court proceeding"

II. Facts and procedural history

Montes Flores walked up to a convenience store counter, stuck his hand beneath his shirt and under the waistband of his pants, and demanded, "Give me all your money, I have a gun."

In response, the clerk opened the cash register and pulled money from the drawer. Montes Flores fled with the cash.

The state charged Montes Flores with "taking property of another . . . while . . . armed with a . . . simulated deadly weapon," consistent with A.R.S. § 13-1904(A)(1):

- "[a] person commits armed robbery if, in the course of committing robbery as defined in § 13-1902, such person . . . *[i]s armed with* a . . . simulated deadly weapon" (emphasis added).

But at trial, the court's instructions told the jury that it could find Montes Flores guilty of armed robbery if it found that he had "used or threatened to use a simulated deadly weapon," consistent with A.R.S. § 13-1904(A)(2):

- "[a] person commits armed robbery if, in the course of committing robbery as defined in § 13-1902, such person . . . *[u]ses or threatens to use* a . . . simulated deadly weapon" (emphasis added).

Neither party noticed the error or objected to it at trial. The jury found Montes Flores guilty of armed robbery.

III. Legal analysis

On appeal, Montes Flores argued that the trial court had amended the indictment through the instructions. He claimed that the amendment amounted to a substantive change to the charge against him, contrary to ARCrP 13.5(b).

The court of appeals agreed in part. What happened at trial amounted to a substantive change to the indictment; it changed the nature of the offense from *possesses* a simulated deadly weapon to *uses or threatens to use* a deadly weapon, violating ARCrP 13.5(b). *State v. Montes Flores*, 245 Ariz. 303, ___, ¶¶ 14, 16 (App. 2018), *rev. denied* (2019).

But not every violation of ARCrP 13.5(b) violates the Sixth Amendment's right to receive notice of the pending charges ("In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . ."). *Montes Flores*, 245 Ariz. at ___, ¶ 17. We need to ask, did the defendant receive notice of the change to the charges? *Id.* In other words, was the defendant prejudiced by the change? *Id.*

Here, the record showed that Montes Flores had notice that the state intending to prove that he used or threatened to use a simulated deadly weapon during the robbery:

- the clerk reported that Montes Flores said he had a gun and demanded money;
- the clerk had not seen a gun but said that he had seen Montes Flores put his hand beneath his shirt and under his waistband;
- surveillance video showed the same thing;
- at a settlement conference well before trial, the prosecutor indicated that the state "would prove that Montes Flores used a simulated deadly weapon and threats of force to commit the robbery," citing the elements in subsection 13-1904(A)(2), not subsection 13-1904(A)(1);
- in the joint pretrial statement, the state alleged that Montes Flores had committed armed robbery "by simulating a deadly weapon," which again was a reference to subsection 13-1904(A)(2).

Moreover, Montes Flores didn't establish prejudice. He never claimed that the change "affected his litigation strategy, trial preparation or examination of witnesses." And the defense attorney countered the state's theory, as amended by the court's instruction, in her closing argument.

Barnes v. Bernini (*State*, Real Party in Interest), 245 Ariz. 185 (App. 2018)

This case involves some complicated arguments about trial procedure and double jeopardy. This analysis focuses on the procedural elements alone.

I. Rules at issue

ARCrP 19.1 Conduct at Trial

> (c) Proceedings if the Defendant Is Charged with Prior Convictions or Noncapital Sentencing Allegations.
>
> > (1) During Determination of Guilt or Innocence. If a prior conviction or noncapital sentencing allegation must be found following a guilty verdict, the trial must proceed initially as though there were no prior conviction or sentencing allegations, unless the conviction or sentencing allegation is an element of the charged crime. . . .
> >
> > (2) After a Guilty Verdict. If the jury renders a guilty verdict . . .
> >
> > > (B) the State must prove to the jury any noncapital sentencing allegation not admitted by the defendant, but it need not do so for any aggravator that is already an element of the offense. . . .

ARCrP 22.5 Discharging the Jury

> (a) Generally. The court must discharge the jury:
>
> > (1) when its verdict *has been recorded* under Rule 23 . . . . (Emphasis added.).

ARCrP 23.3 Polling the Jury

> (a) Generally. After the jury returns a verdict and before the court dismisses the jury, the court must poll the jury at the request of any party or on the court's own initiative. If the jurors' responses to the poll do not support the verdict, the court may direct them to deliberate further or the court may dismiss the jury. . . .

I. Relevant facts

The state indicted Barnes on multiple felonies, including Manslaughter and Endangerment.

Separately, the state alleged that the Manslaughter and Endangerment counts were of a dangerous nature.

The state also alleged that the lesser-included offense (Negligent Homicide) was of a dangerous nature.

At trial, during the guilt phase, the trial court gave the jury instructions for Manslaughter as well as Endangerment. The court also instructed the jury that those offenses were alleged to be of a dangerous nature.

The court likewise instructed the jury on Negligent Homicide but *did not* inform the jury that this offense was also alleged to be of a dangerous nature. (The court later took responsibility for the omission.)

Murphy's Law. Naturally, the jury found the defendant not guilty of Manslaughter and guilty of Negligent Homicide and Endangerment, setting up a conflict about the missed dangerousness interrogatory for Negligent Homicide. (The jury found that Endangerment was of a dangerous nature.) After the verdicts were announced, the prosecutor asked that the jury be given a dangerousness interrogatory for Negligent Homicide and told to decide it. The defendant opposed, and the court declined the prosecutor's request.

About a week later, the state requested the court to empanel a jury to decide the aggravating factor that had been missed at trial. The court ultimately granted the state's request, prompting Barnes to seek special-action relief. The court of appeals accepted jurisdiction this and other issues but denied relief.

II. Legal analysis

The procedure used here to return verdicts on the dangerousness allegations did not comply with ARCrP 19.1(c). Under ARCrP 19.1(c), unless the sentencing allegation is an element of the offense, the allegation is not mentioned or adjudged during the guilt phase. *Barnes v. Bernini*, 245 Ariz. 185, ___, ¶ 15 (App. 2018). The dangerousness allegations for all offenses should have been considered after the guilt phase. *Id.* Since that's the normal procedure, the trial court committed no error in ordering a jury empaneled to consider dangerousness for Negligent Homicide.

This issue led to a second, somewhat related issue: when is a verdict "recorded?" Barnes argued that, under Rule 22.5, the trial court could not have submitted the question of dangerousness for Negligent Homicide once the verdicts had been rendered because the trial court was obligated to discharge the jury.

Rule 22.5(a)(1) tells the court to discharge the jury when its verdict has been recorded under Rule 23. But Rule 23 doesn't describe when that occurs, nor does it even contain the word recorded.

The court of appeals determined that a verdict is not recorded when the verdict is first announced. *Barnes v. Bernini*, 245 Ariz. at ___, ¶ 23. The verdict becomes recorded once the jury is polled, or when polling is waived: "Rule 23.3 compels the conclusion that a verdict is not 'recorded,' and the jury is not subject to discharge under Rule 22.5, until after the parties have responded to a court's invitation to poll the jury." *Id.*

Amendment to ARCrP 32 (updated as of April 15, 2019)

Here are some proposed changes to Rule 32 that I think are important. I may not cover everything that *you* would find important. I encourage you to review and comment on, if appropriate, the proposed changes to Rule 32. The comment period ends May 1.

The biggest change you see is the decision to divide the content of current Rule 32 into proposed Rules 32 and 33.

- Under current Rule 32, postconviction relief is primarily aimed at providing an appellate remedy to defendants who pleaded guilty. But it can also apply in certain circumstances to those defendants who went to trial and who may have even appealed (it is the only avenue, for instance, for alleging ineffective assistance of counsel (IAC)).
- To clarify the postconviction process, the Task Force divided current Rule 32 into proposed Rules 32 and 33; each rule is self-contained.
- Proposed Rule 32 now applies exclusively to defendants who exercised their right to trial or contested probation-violation hearings.
- Proposed Rule 33 applies exclusively to defendants who pleaded guilty (or no contest) or who admitted a probation violation.

Second, the Task Force (TF) identified two additional grounds for relief that aren't subject to preclusion. Under both the current and proposed postconviction-relief rules, Grounds for Relief are listed. Postconviction relief is not authorized outside of these specified areas. In addition, under the rules, some grounds for relief can be precluded if, for instance, they were not timely raised or if the basis was or could have been raised in another proceeding, like an appeal. Certain grounds for relief are not subject to preclusion. To this list, the TF added claims raising subject-matter jurisdiction as well as those alleging that the sentence imposed exceeded the maximum allowed by law.

Third, the TF proposed requiring in proposed Rule 32.5(b) the appointment of co-counsel in a capital PCR proceeding, when the trial court deems it appropriate. This practice is currently in effect in Maricopa County (according to the Task Force).

Fourth, in proposed Rules 32.6(b) and 33.6(b), the TF proposed adding rules of discovery for PCR proceedings that codify but also exceed what was set forth in *Canion v. Cole*, 210 Ariz. 598 (2005). In theory, discovery is still limited. After the filing of the PCR notice, a defendant could obtain discovery by showing *substantial*

need. After the filing of the PCR petition, the burden for discovery falls to *good cause*. Both *substantial need* and *good cause* are defined in the respective rules.

Fifth, in response to *State v. Chavez*, 243 Ariz. 313 (App. 2017), *rev. denied* (2018), the TF compiled in proposed Rules 32.6(c) and 33.6(c) an extensive list of requirements or avowals that PCR counsel must include in any Notice of No Colorable Claim.

Sixth, memorializing in proposed Rules 32.6(f) and 32.6(f) what seems obvious, but which often leads to disputes, the TF noted that a defendant waives the attorney-client privilege for any information necessary to allow the state to rebut an IAC claim.

Seventh, good news, ahem, to all of you prosecutors who respond to PCR petitions in capital cases and to any judges present, the TF recommended doubling the page limit for petitions (from 80 to 160). Limits for responses and replies in capital cases are also doubled.

Eighth, the TF added a change-of-judge provision in proposed Rules 32.10(a) and 33.10(a) if the PCR proceeding is assigned to a new judge.

Ninth, following up on *Fitzgerald v. Myers*, 243 Ariz. 84 (2017), the TF added 32.11(d) and 33.11(d) to the proposed rules, enabling trial judges to order competency evaluations for defendant's when necessary for the presentation of a claim. These evaluations will be outside the process described in ARCrP 11.

Tenth, a "conforming" change was made to ARCrP 17.1(e) (Waiver of Appeal) because of changes made to Rule 32.

APAAC's Comment

On April 15, APAAC filed a Comment to the Amended Petition. It is well worth reading. APAAC's Comment, as well as the Amended Petition, can be found at https://www.azcourts.gov/Rules-Forum/aft/949, if you haven't had an opportunity to review either.

APAAC's Comment notes (and develops arguments concerning) four areas of concern. Those areas were summarized by APAAC as follows:

- "proposed Rule 32.1(h) allows defendants to present new mitigation evidence to allege actual innocence of the death penalty, contradicting *Sawyer v. Whitley*, 505 U.S. 333, 345 (1992)";

- "although the Task Force's petition takes steps to avoid piecemeal litigation by limiting the application of Rules 32.2(b) and 33.2(b), those Rules should require a showing of good cause to prevent unnecessary successive petitions";
- "the Task Force's petition creates a new right to prepetition discovery. That right could unnecessarily burden the State with discovery requests for claims that may never come to fruition";
- "the Task Force's petition may inadvertently require the appointment of defense counsel for successive petitions that raise claims not subject to preclusion. If so, the Task Force's petition would expand defendants' rights to appointed counsel."